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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209617
Party	Defendant Debra Wiseberg
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Submission	Opposition/Response to Motion
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Signature	/Debra Wiseberg/
Date	09/24/2014
Attachments	Applicant's Response to Opposer's Motion to Dismiss and Strike.pdf(472255 bytes ) Applicant's Brief in Opposition to Opposer's Motion to Dismiss and Strike.pdf(5334045 bytes ) Applicant's Exhibit A.pdf(331609 bytes ) Applicant's Exhibit B.pdf(189434 bytes ) Applicant's Exhibit C.pdf(369093 bytes ) Applicant's Exhibit D.pdf(2147545 bytes )

APPLICANT AND COUNTERCLAIM PLAINTIFF'S RESPONSE TO OPPOSER AND  
COUNTERCLAIM DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
MOTION TO STRIKE APPLICANT'S AMENDED COUNTERCLAIMS

The Applicant objects to the Opposer and their counsel filing two separate motions within the same document, the inclusion of yet another separate matter within such document, and the Opposer's exhibit to their motion labeled Exhibit 'A'. The Opposer and their counsel have stated they aren't requesting the Board grant sanctions against the Applicant to avoid tying

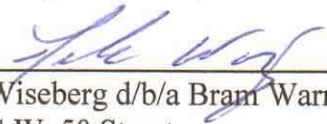
up further resources of the Board and the parties and then essentially requests the Board grant sanctions against the Applicant within their motion to dismiss or, in the alternative, motion to strike Applicant's amended counterclaims. TBMP § 527.02 states, "a motion for sanctions must be made separately from any other motion". I have responded to these arguments to protect my rights and do not waive my objection to the inclusion of such matter because I have responded to the Opposer's request in order to preserve my rights and prevent the Opposer and their counsels attempt to strip them.

The Applicant respectfully requests the Board deny the Opposer's Motion to Dismiss and Motion to Strike. In addition, I respectfully request the Board deny the Opposer's counsels inappropriate request to the Board to require the Applicant to either obtain counsel, participate in mediation held in Kansas City, Missouri, Xikar, Inc.'s place of business or other forced action.

The Applicant's Brief in Opposition to the Opposer's Motion to Dismiss or, in the alternative, Motion to Strike Applicant's Amended Counterclaims, and Exhibits are attached hereto.

Dated: September 24, 2014

Respectfully submitted,

By:   
Debra Wiseberg d/b/a Bram Warren Company  
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CERTIFICATE OF FILING

I hereby certify that the Applicant's Response to the Opposer's Motion to Dismiss or, in the alternative, Motion to Strike Applicant's Amended Counterclaims, Opposition Brief and Exhibits were filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board by ESTTA on September 24, 2014.

By:

  
Debra Wiseberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Applicant's Response to the Opposer's Motion to Dismiss or, in the alternative, Motion to Strike Applicant's Amended Counterclaims, Opposition Brief and Exhibits were sent to the counsel for the Opposer by the United States Postal Service, first class mail on September 24, 2014 to the following address:

Ginnie C. Derousseau  
Erickson, Kernell, Derousseau & Kleypas LLC  
8900 State Line Road, Suite 500  
Leawood, KS 66206

By:

  
Debra Wiseberg



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Xikar, Inc.,	1	
	§	
	§	
Opposer,	§	Opposition No. 91209617
	§	
v.	§	Mark: Cicar
	§	
Debra Wiseberg d/b/a	§	Serial No. 85/652496
Bram Warren Company,	§	
	§	
Applicant.	§	
	J	

APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE  
APPLICANT'S AMENDED COUNTERCLAIMS

I. INTRODUCTION

The Opposer has filed a motion to dismiss or, in the alternative, motion to strike the Applicant's amended counterclaim, and has improperly included a third matter within such motion. The following is the Applicant's response in opposition to such motion.

The Applicant objects to the Opposer improperly including arguments outside the pleadings concerning the Applicant's claims that are inappropriate for a motion to dismiss/strike and I will not respond to these arguments (see TBMP § 503.02). The Applicant also objects to the inclusion of a third separate matter requesting the Board force the Applicant to either obtain counsel, participate in mediation in Kansas City, Missouri, Xikar, Inc.'s place of business or other such forced action, and does not waive her objection to the inclusion of such matter because the Applicant has responded to the Opposer's request in order to preserve her rights and prevent the Opposer from trying to strip them.

II. OBJECTION TO EXHIBITS

The Applicant objects to the Opposer's exhibits to their motion to dismiss/strike and any response given by the Applicant in connection with such exhibits or settlement negotiations is solely to protect her rights in this matter and does not waive her objection. Fed. R. Evid. 408, allows for the introduction of settlement negotiations only in specific circumstances and the Opposer and their counsel did not specify under what exception the Opposer is introducing such evidence. As the Opposer has not stated a valid exception, the Applicant objects to the introduction of such evidence.

### III. LEGAL STATUTES

#### A. AMENDED COUNTERCLAIM

Fed. R. Civ. P. 15, states "a party may amend its pleading with the court's leave. The court should freely give leave when justice so requires". TBMP § 313.04 and 37 CFR § 2.106(b)(2)(i), states "if grounds for a counterclaim are learned during the course of the opposition proceeding, the counterclaim shall be pleaded promptly after the grounds therefor are learned". 37 CFR §2.115, states "pleadings in a cancellation proceeding may be amended in the same manner and to the same extent as in a civil action in the United States district court". Fed. R. Civ. P. 11, states that a party by "presenting to the court a pleading, written motion, or other paper certifies that to the best of the person's knowledge, information or belief formed after an inquiry reasonable under the circumstances" that, "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law".

#### B. MOTION TO DISMISS

TBMP § 503.02, states "a motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of legal sufficiency of a complaint. In order to withstand such motion, a complaint need only allege such facts as would, if proved, establish that the plaintiff is



entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for canceling the subject registration". TBMP § 503.02, further states "a plaintiff served with a motion to dismiss for failure to state a claim upon which relief can be granted need not, and should not respond by submitting proofs in support of its complaint. Whether a plaintiff can actually prove its allegation is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions".

#### C. MOTION TO STRIKE

Fed R. Civ. P 12(f), states "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter". TMBP § 506.01, states "motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case". TMBP § 506.01, further states that "the Board, in its discretion, may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises issues that should be determined on the merits." TMBP § 506.02, states "a motion to strike matter from a pleading should be filed within the time for, and before, the moving's party responsive pleading. However, a motion to strike matter from a pleading will not relieve the defendant from filing its responsive pleading."

#### IV. ARGUMENTS

There is evidence that supports the allegations made by the Applicant against the Opposer, whether or not the Board considers such evidence sufficient to prove my counterclaim and cancel the Opposer's mark "Xikar", should be determined through trial and after a complete and full argument of the issues. All grounds pled by the Applicant during this proceeding have been based on trademark law as it is written and no argument made by the Applicant has been

frivolous. The Applicant's Amended Counterclaim is based on the following trademark laws

Generic and Functional, Trademark Act §14(3); 15 U.S.C. § 1064(3), which states a petition to cancel a registration may be filed "at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional".

Consists of and Comprises Deceptive Matter, Trademark Act § 14(3); 15 U.S.C. § 1064(3);

Trademark Act § 2(a); 15 U.S.C. §1052(a), which states a petition to cancel a registration may be filed at any time if it "consists of and comprises deceptive matter". Misrepresentation as to

Source of Goods, Trademark Act §14(3); 15 U.S.C. § 1064(3), which states a petition to cancel a registration may be filed at any time "if the registered mark is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used. Fraud, Trademark Act §14(3); 15 U.S.C. § 1064(3), which states a petition to cancel a registration may be filed at any time if "its registration was obtained fraudulently".

The Applicant's Amended Counterclaim contains new allegations and grounds, and includes previous plead allegations that have been filed pursuant to Fed. R. Civ. P. 15; TBMP § 303.04; 37 CFR § 2.106(b)(2)(i); 37 CFR §2.115 and the Board's decision dated July 18, 2014, in which the Board stated "Applicant is allowed until August 14, 2014, to file and serve an amended counterclaim in which Applicant sets out a valid ground for canceling the subject registration, if she has a reasonable basis therefor". The Opposer's counsel has alleged on page 4 of their motion to dismiss/strike, that the Board only granted the Applicant the opportunity to file amended versions of the stricken claims because the Board cited the decision in *Musical Directions v. McHugh*, 104 USPQ2d 1157, 1160 (TTAB 2012). The Board's decision dated July 18, 2014 did not state that the Applicant was only granted the right to file amended versions of the stricken claims, so the Applicant has not construed the Board's decision to mean such and has included in her amended counterclaim, new allegations and grounds learned during this



proceeding. If the Board's intention was only to allow the Applicant to file amended versions of the stricken claims previously filed, then I respectfully request the Board allow the Applicant pursuant to Fed. R. Civ. P. 15; TBMP § 303.04; 37 CFR § 2.106(b)(2)(i); and 37 CFR § 2.115 to amend her counterclaim to include new allegations and grounds learned during this proceeding and not known to the Applicant when the original counterclaim was filed, and grounds pled in response to the Board's decision dated July 18, 2014.

The grounds within the Applicant's counterclaim have all been based on written trademark law. The most that can be said against any of the Applicant's arguments is that there may exist precedent which contains an interpretation of such written laws that varies from the Applicant's interpretation. A party may assert arguments that may be contrary to precedent in hopes of overturning such precedent. If the exact facts and arguments contained in this proceeding do not exist in another matter, such should also be considered when making decisions based on precedent.

Standing to assert all available claims allowed by statute in a cancellation proceeding should be absolute in connection with the filing of a counterclaim, when a plaintiff is using and pleading the validity of such registration to oppose a defendant's mark. The damage incurred by a defendant as a party to an opposition proceeding in such a case is without question. To allow a registration with questionable validity to be used to oppose another party's application to register their intellectual property and engage such party in litigation, and then to have such party be prevented from attacking the validity of such questionable mark would be unjust. It is not the same as someone who is not a defendant in which the registration was pleaded and at issue, filed a cancellation proceeding against a registration stating the same alleged facts who was not either an affected person or group or someone whose goods were falsely affiliated, associated, misrepresented with and by the other party, and so forth, because there would be no damage incurred by the alleging party. A defendant in a litigation where the plaintiff has pleaded the

registration of a mark to oppose the defendant's registration should be allowed to attack the validity of said mark by pleading any claim allowed by statute, whether or not they are directly affected by the actions that such claims are based on. The defendant in a legal action where a mark has been pleaded as a basis to engage such party in litigation and used in an attempt to block the defendant's registration, is directly affected by the registration of such questionably valid mark and the actions of the plaintiff. The registration of such mark will continue to damage such defendant if they are not allowed to impose all claims available by statute to protect and defend their intellectual property.

For the record and with all due respect to the Board, I object to the Applicant's response to the Opposer's Motion for Summary Judgment being considered a cross-motion by the Applicant for summary judgment. I simply cited and incorporated into my response to such motion the following "If the Board concludes that there is no genuine dispute of material fact, but that the nonmoving party is the one entitled to judgment as a matter of law, the Board may, after giving notice and a reasonable time to respond, grant summary judgment in favor of the nonmoving party", TBMP § 528.01, Note 17. As the non-moving party I was only requesting the Board invoke such statute if they deemed it appropriate. My response to the Opposer's Motion for Summary Judgment was merely a summary of the Applicant's arguments and was not a full and complete argument of the issues. I would not be able to give a full and complete argument of the issues in only 25 pages, nor was I required to do so in response to the Opposer's Motion for Summary Judgment and only summarized my arguments. The Applicant's intention was only to defend against the Opposer's motion not file a cross-motion for summary judgment.

Since the Opposer has used this motion as a vehicle to personally attack the Applicant and request actions be forced on the Applicant, and has made the misleading and inaccurate statement that this proceeding has taken an "outrageous course" and other misleading and inaccurate statements, I have defended myself against such statements. The Applicant maintains



her objection to the inclusion of this additional matter within the Opposer's Motion to Dismiss/Strike and does not waive her objection because the Applicant has defended herself against the Opposer's allegations in fear of losing her chance to do so.

No argument or claim filed by the Applicant has been "frivolous", "cherry picked", "thrown against a wall to see if it stuck", or used as a "catch-all" as stated by the Opposer in their motion to dismiss/strike and their reply filed in connection with their motion for summary judgment. The Opposer is pleading the registration of the "Xikar" trademark in the opposition proceeding against the Applicant, and has used such registration as a basis to force the Applicant into litigation. As part of a defense to an opposition proceeding the responding party should take a complete look at the Opposer's pleaded mark and its validity and that is what the Applicant has done.

The Opposer and their counsel stated on page 8 of their motion to dismiss/strike, that the fraud counterclaim is "a catch-all in case other claims fail", when this is definitely not the case. The Applicant has incorporated all general allegations into the fraud claim because they support various elements of the fraud claim. The fraud allegation is based on the history of the use of the mark "Xikar" and misrepresentations and omissions made by Kurt Van Keppel and the Opposer and was learned from documents produced by the Opposer during this proceeding. New allegations and grounds contained within the Applicant's Amended Counterclaim such as the fraud claim and other claims and allegations are based on facts and information learned by the Applicant during this proceeding, and obtained from documents produced by the Opposer through discovery and attached to their motion for summary judgment. Elements of this claim were referenced in the Applicant's response to the Opposer's Motion for Summary Judgment. The Applicant intended to file a motion requesting the Board allow her to amend her counterclaim to include new allegations and grounds before her previous claims were even stricken. Due to the course of these proceedings and the Opposer filing their motion for summary

judgment, the Applicant was not able to amend her counterclaim before now.

The Opposer has referenced in the foot note on Page 3 of their motion to dismiss/strike, the inclusion or lack thereof of a pluralized “s” in counterclaim in the Applicant’s title and section heading of her amended counterclaim. The Applicant has filed one counterclaim action (title-Amended Counterclaim) for cancelation of the mark “Xikar” which contains multiple claims and grounds within such counterclaim (section heading - Counterclaims for Cancelation). The purpose of such pleading is to give notice of one party’s claims to another party, so I’m mystified as to why they have even broached this topic, except as an excuse to criticize the Applicant.

Though I don’t find the Opposer’s motion concise in its arguments, it states on page 2 of the Opposer’s Motion to Dismiss/Strike that the motion to dismiss is for failing to state a claim upon which relief can be granted. To survive a motion to dismiss a party need only plead a claim for relief that is plausible on its face, (see TBMP § 503.02) and a party should not respond to a motion to dismiss by arguing the merits of the case or by submitting evidence to prove its claims. In section II under legal standards of the Opposer’s Motion to Dismiss/Strike, the Opposer references the Board’s ability to strike a claim and then proceeds to state in section III under analysis that the Applicant’s counterclaims are “compulsory counterclaims”; that “existed when BWC’s answer was filed”; that “none of the new counterclaims rely on facts that were unavailable at the beginning of this case”; and “should be immediately rejected”, so I will respond to these named allegations made by the Opposer.

A. AGAINST OPPOSER’S MOTION TO DISMISS OR,  
IN THE ALTERNATIVE, MOTION TO STRIKE

The Applicant has stated claims for canceling the Opposer’s registered trademark “Xikar”, upon which relief can be granted and respectfully requests the Board deny the Opposer’s Motion to Dismiss and the Applicant further requests the Board deny the Opposer’s



alternative, Motion to Strike.

**GENERAL ALLEGATIONS**

*For clarity's sake, the following numbered paragraphs do not correspond to the numbered paragraphs in the Applicant's Amended Counterclaim. The numbered paragraphs within the Applicant's Amended Counterclaim are referenced within the following numbered paragraphs.*

1. General allegations, paragraph No. 1 is one of the basis for multiple allegations and grounds, including paragraphs No. 5, 6, 9, 23, 24 through 33, 38 and 39 and was learned by the Applicant during this proceeding and was contained within documents produced by the Opposer through discovery and as exhibits to their motion for summary judgment and was not known by the Applicant until after such motion was filed.
2. General allegations, paragraph No. 2 as it pertains to "sika" has previously been pled by the Applicant in the original counterclaim filed and has been incorporated into the Applicant's Amended Counterclaim; as it pertains to "zika" this was learned by the Applicant when I did a recent search on the internet and was not previously known by the Applicant.
3. The facts and grounds contained in general allegations, paragraphs No. 3, 7, and 8 have previously been pled by the Applicant in the original counterclaim filed and have been incorporated into the Applicant's Amended Counterclaim.
4. Facts contained in general allegations, paragraphs No. 4, 5, 10, 11, 14, 15, and 18 through 23 were learned by the Applicant during this proceeding, and were contained within documents produced by the Opposer through discovery and with their motion for summary judgment. Some allegations listed contain supporting elements previously pled by the Applicant.
5. General allegations, paragraph No. 6 contains new and previously pled allegations and is further discussed in the following section "counterclaims for cancelation, functional".
6. General allegations, paragraph No. 9 contains previously pled allegations and is also based on new information learned by the Applicant during this proceeding and is further discussed in the following section "counterclaims for cancelation, consists of and comprises

deceptive matter and misrepresentation as to source of goods”.

7. General allegations, paragraph No. 12 contains facts and evidence, learned and investigated by the Applicant after she received and reviewed documents produced by the Opposer.

8. General allegations, paragraph No. 13 is based on law pertaining to corporations.

9. General allegations, paragraphs No. 16 and 17, contain facts and evidence, that upon learning of the past use of the “Xikar” trademark, substantiate and support the Applicant’s fraud claim.

10. General allegations, paragraph No. 24 contains previously pled and new allegations.

***Counterclaims for Cancellation***

*For clarity’s sake, the following numbered paragraphs do not correspond to the numbered paragraphs in the Applicant’s Amended Counterclaim. The numbered paragraphs within the Applicant’s Amended Counterclaim are referenced within the following numbered paragraphs.*

The following is a brief review of the five grounds pled within the Applicant’s Amended Counterclaim, and the Applicant’s right (and requests to the Board) to bring such claims, and is not in any way, an argument on the matter, only on the pleadings.

1. Generic, Trademark Act §14(3); 15 U.S.C. § 1064(3). A generic claim may be filed at any time and is available against a registration over 5 years old. This is a previously alleged counterclaim that contains elements that were not known to the Applicant before discovery and the Opposer’s Motion for Summary Judgment was filed and includes previously pled allegations. The Opposer’s mark “Xikar” is a translation of the word “cigar” (allegation contained in paragraphs No. 1 and 26 of the Applicant’s Amended Counterclaim). The genus of the Opposer’s goods under the registration for the mark “Xikar” is not “cutters” but “cigar cutters”, so the word “cigar” can’t be removed from the designation of the genus of the Opposer’s goods (allegations contained in paragraphs No. 5 and 26 of the Applicant’s Amended



Counterclaim). In addition, though the Opposer's registered goods for the mark "Xikar" are "cigar cutters" only, the Opposer has fraudulently and inappropriately used the "Xikar®" mark with the registration symbol in connection with the sale of "cigars" (allegations contained in paragraphs No. 3 and 22 of the Applicant's Amended Counterclaim), so the Applicant should be allowed to include such element within her generic claim. The Opposer has also tried to have consumers pronounce their mark as "cigar" (allegation contained in paragraph No. 4 of the Applicant's Amended Counterclaim). The Applicant and her predecessor in interest have been forced to engage in this litigation and have filed a counterclaim for cancelation of the Opposer's mark in defense of the opposition proceeding filed by the Opposer against the application to register the Applicant's intellectual property and trademark "Cicar". Many facets of the opposition and counterclaim for cancelation correlate including, but not limited to, the Applicant's generic counterclaim. As the saying goes "you can't have your cake and eat it too", so should the Opposer not be allowed to have it both ways, by claiming their mark is not generic while in the same breath trying to lay claim to rights based on its generic nature and characteristics, which they are not entitled to claim.

2. Functional, Trademark Act §14(3); 15 U.S.C. § 1064(3). A claim that a mark is functional may be filed at any time and is available against a registration over 5 years old. This is a newly alleged ground for cancelation of the Opposer's mark. The functional claim has two main elements 1) that the Opposer's trademark "Xikar" is a translation of the word "cigar" (allegation contained in paragraphs No. 1 and 26 of the Applicant's Amended Counterclaim), this was learned by the Applicant from documents produced by the Opposer through discovery and attached to the Opposer's Motion for Summary Judgment and was not known to the Applicant when the original counterclaim was filed and was also referenced in the Applicant's response to the Opposer's Motion for Summary Judgment); and 2) the Opposer's registered goods are "cigar cutters" and such goods are made for and only to be used with "cigars"

(allegation contained in paragraphs No. 6 and 26 of the Applicant's Amended Counterclaim).

This counterclaim also includes supporting allegations that were previously pled by the Applicant. The functional counterclaim has been pled in response to the Board striking the Applicant's original generic counterclaim. The Applicant by pleading the functional claim is requesting, that if upon determination of the Board after a trial of the issues, they deem the Opposer's mark not generic based solely on the inclusion of the word "cutters" in the genus of the Opposer's goods (though the Applicant would not agree with this contention); that the Board deem the Opposer's mark functional due to the fact that the product is made for and solely to be used with "cigars", its sole function being to cut "cigars". The Applicant requests the Board allow her to plead both the generic and functional claim, in the hope of proving the Opposer's mark is generic and/or functional.

3. Consists of and Comprises Deceptive Matter - Trademark Act § 14(3); 15 U.S.C. § 1064(3); Trademark Act § 2(a); 15 U.S.C. §1052(a). A claim that a mark consists of and comprises deceptive matter may be filed at any time and is available against a registration over 5 years old. This is a previously alleged counterclaim and consists of previously pled allegations and includes new allegations learned from information that was not known or available to the Applicant before discovery and the Opposer's Motion for Summary Judgment was filed. The Board's decision dated July 18, 2014, stated that in order to properly plead deceptiveness the following must be pleaded: 1) Opposer's involved mark misdescribes the identified goods; (2) consumers would be likely to believe the misrepresentation; and 3) the misrepresentation would materially affect potential purchasers' decision to purchase the product. These elements have been pled in paragraphs No. 1 through 4, 7 through 9, and 27 through 29 of the Applicant's Amended Counterclaim.

4. Misrepresentation as to Source of Goods – Trademark Act §14(3); 15 U.S.C. § 1064(3). A claim of misrepresentation as to source of goods may be filed at any time and is



available against a registration over 5 years old. This is a newly alleged ground for cancellation of the Opposer's mark and is being pled in response to the Board striking the Applicant's claim against the Opposer that the "Xikar" trademark falsely suggests a connection to persons, living or dead. I would have pleaded the new allegations under the "falsely suggests" claim, but due to such claim being stricken, I have now included the new allegations under the new ground of misrepresentation as to source of goods. The new allegations alleged by the Applicant within this new ground are 1) that the Opposer's trademark "Xikar" is a translation of the Mayan word for "cigar" (allegation contained in paragraph No. 1, and incorporated into paragraphs No. 30 and 31 of the Applicant's Amended Counterclaim); and 2) actions and statements made by the Opposer may cause confusion in consumers as to the source of the Opposer's goods (allegations contained in paragraphs No. 1, 2, 7, 8, 9, 29, and 31 of the Applicant's Amended Counterclaim) and is based on new information learned from documents produced by the Opposer during this proceeding, and also consists of previously pleaded facts, such as the deep history between the Mayans and cigars, and that the Opposer has deceptively stated a strong affiliation with the Mayans (allegations contained in paragraphs No. 7, 8, and 29, and incorporated into paragraphs No. 30 and 31 of the Applicant's Amended Counterclaim). In response to the Opposer's statement within their motion to dismiss/strike that this claim can't be alleged by the Applicant unless it is the Applicant or her goods of which the misrepresentation is being made, please see my brief argument on standing to allege a claim on pages 5 and 6 of the Applicant's brief. The Applicant would request that if the Board finds my brief argument on standing persuasive, as to the Applicant's standing to bring a claim as a counterclaimant, whether or not the Applicant is a person, group, or business directly affected by such claimed actions; I would request the Board reinstate the Applicant's falsely suggests a connection to persons living or dead claim, and allow her to further amend her counterclaim to include such claim, as required.

5. Fraud - Trademark Act §14(3); 15 U.S.C. § 1064(3). A claim that a registration

was obtained fraudulently may be filed at any time and is available against a registration over 5 years old. This counterclaim is based on facts and information that was not known or available to the Applicant before the Opposer produced documents through discovery and in connection with their motion for summary judgment and is based on the history of use of the mark "Xikar", and misrepresentations and omissions made by Kurt Van Keppel and the Opposer in documents filed with the USPTO and elsewhere. After the Applicant obtained this information, I investigated my conclusions, and have promptly filed an amended counterclaim to include these newly learned allegations and grounds. The Applicant was incapable of learning or pleading the newly alleged facts and claim of fraud, until I received the information from the Opposer regarding the past use of the mark "Xikar". The Opposer has cited Fed. R. Civ. P. 9(b) and stated on page 8 of their motion to dismiss/strike that the Applicant has not stated with particularity the circumstances constituting fraud, when this is not the case, and they have also listed 5 elements they state must be shown. The circumstances that constitute fraud by the Opposer are listed in paragraphs No. 1 through 24, and 32 through 39. This claim also contains previously pled supporting allegations such as the Opposer has tried to obtain rights to the words "cigar" and "sikar" and their characteristics through the registration of the trademark "Xikar". Many listed allegations support the Applicant's fraud claim and is the reason they have been incorporated into the fraud claim. The Opposer and their counsel have stated in their motion to dismiss/strike, that the Applicant's fraud claim is a "catch-all in case other claims fail" and that the claim "is nothing more than a smear campaign", this is not the case and would be pointless. The only party engaging in a smear campaign is the Opposer and their counsel. I had no way of deciphering and knowing before discovery of the past details involving the use of the mark "Xikar", such information was obtained and learned through documents produced by the Opposer during discovery and attached to their motion for summary judgment. The Applicant has named specific acts and circumstances that constitute fraud by the Opposer and has named



the necessary elements of a fraud claim. The Opposer has further stated in their motion to dismiss/strike, that the Applicant has not named two specific elements and “without these two elements BWC’s claim for fraud cannot stand”. The two elements named by the Opposer were that the USPTO “reasonably relied on any alleged misrepresentations” or that “there was damage resulting from reliance”. It is known by all who file documents with the USPTO that they do not investigate statements and claims made by persons filing documents with the USPTO and that it is left to inter partes proceedings to prove or disprove such statements and claims. The fact that Kurt Van Keppel was issued a federal registration alone signifies the USPTO relied on the facts submitted by Kurt Van Keppel, and later by the Opposer. I have stated within my fraud claim that Kurt Van Keppel and the Opposer did knowingly and fraudulently obtain the registration for the mark “Xikar” based on invalid documents filed with the USPTO. The damage caused by the Opposer’s registration has been incurred by the Applicant. This was stated in my closing paragraph on page 7 of the Applicant’s Amended Counterclaim, and may be incurred by others, affected by the Opposer’s mark, misrepresentations and omissions.

It does not matter if a fact existed at the time the Applicant’s predecessor in interest filed the original counterclaim, as stated by the Opposer in their motion to dismiss/strike, if the Applicant was incapable of knowing or learning such facts at that time. In order to make a claim based on past occurrences and use of a mark, as the Applicant has in the fraud claim, a party must learn and have knowledge of such and the Applicant was unable to do so before obtaining this information from the Opposer and analyzing such information.

B. AGAINST OPPOSER’S REQUEST TO THE BOARD TO REQUIRE  
THE APPLICANT TO EITHER OBTAIN COUNSEL OR PARTICIPATE IN MEDIATION  
HELD IN KANSAS CITY, MISSOURI, XIKAR, INC.’S PLACE OF BUSINESS.

As previously stated, the Applicant objects to the inclusion of this third matter and the Opposer’s request that I be forced to obtain counsel, participate in mediation or other such forced action, within the Opposer’s Motion to Dismiss/Strike and hereby responds to such

request only to protect her rights in this matter and does not waive her objections to such matter and the fact that the Opposer is essentially asking for sanctions while at the same time stating they are not. A motion for sanctions has certain requirements of filing that the Opposer has not adhered.

Bullying unfortunately has become common practice within trademark courts. New and small companies are largely unable to defend themselves against trademark litigation and are forced to relinquish rights to their intellectual property when such rights are opposed by a company who has greater financial resources to intimidate and subdue their would be adversaries. Companies are well aware of the advantage afforded them when they have greater financial resources than a new or smaller company would have and use such greater financial resources to crush their opponent into submission.

Since the Opposer has not been able to subdue the Applicant, they are now requesting the Board do so, by stating that I should be forced to either obtain counsel, participate in mediation held in Kansas City, Missouri, Xikar, Inc.'s place of business, or other forced action. I am outraged that the Opposer's counsel, adverse to governing law, is requesting the Board strip the Applicant of my legal rights. One of the basis for the Opposer's request is because I have not agreed to the Opposer's settlement terms, relinquishing certain rights. Decisions regarding settlement reside in the parties themselves and not their counsel no matter the attorney's opinion. The Opposer and their counsels contention that if the Applicant and her predecessor had retained counsel this matter would be settled and would likely never have been filed is ludicrous. I have explained my position on this matter to the Opposer, which is that I don't believe the Opposer has any right to dictate and control the use of my mark "Cicar" and I have no intention of just relinquishing rights to my intellectual property.



After the Opposer filed two extensions of time to oppose the "Cicar" trademark and before they filed their Notice of Opposition, Kurt Van Keppel went outside the contact information given in connection to the trademark application for the Applicant's mark "Cicar" and obtained Bram Warren's personal telephone number from a former distributor and then contacted him on such personal telephone number. During the telephone conversation between Kurt Van Keppel and "Bram Warren", Mr. Van Keppel stated that Xikar, Inc. did not mind if the trademark "Cicar" was used in commerce, but stated they wanted the trademark application withdrawn (see Applicant's Exhibit "A"). The Opposer improperly contacted "Bram Warren" which the Applicant considers a tacit bullying action. If the positions were reversed I'm sure the Opposer's officers and employees wouldn't have liked receiving an unsolicited call on a private line not connected to the actual application in question. The Opposer's request that the application be withdrawn was illogical and not a settlement offer and should not be considered as settlement negotiations.

The Opposer's current counsel Erickson, Kernell, Derusseau & Kleypas LLC is the second law firm appointed by the Opposer to represent them in this matter. The Opposer's previous counsel was J. David Wharton of the firm Stinson, Morrison, Hecker, LLP formerly of the firm Shook, Hardy & Bacon, LLP. Mr. Wharton was the designated attorney for the "Xikar" trademark since its inception and personally filed the trademark application, and whose firm filed the opposition case on behalf of the Opposer. During this proceeding the Opposer changed counsel and appointed Erickson, Kernell, Derusseau & Kleypas LLC as their new counsel.

The first time I was contacted by the Opposer's current counsel Erickson, Kernell, Derusseau & Kleypas LLC (after they filed a Change of Correspondence Address), was by a telephone message left by Ginnie C. Derusseau in which she requested I return her telephone

call. I returned Ms. Derousseau's call and was told she was not in the office, so I left a telephone message requesting that she send me an email. I have attached Ms. Derousseau's email in response to my telephone message as the Applicant's Exhibit "B". Ms. Derousseau stated in her email "It does not appear that you are an attorney. It is a longstanding rule that corporations must be represented by counsel in legal proceedings. If you are not an attorney, we will be happy to discuss this proceeding and substantively respond to your September 9, 2013 letter with your counsel." I responded to Ms. Derousseau's email as shown in the Applicant's Exhibit "C", in which I cited 37 C.F.R. §11.14; 37 C.F.R. § 11.14(e)(3); TBMP § 114 and TBMP § 114.01, which allow for an officer of a corporation to act on behalf of the corporation in a TTAB proceeding. The Applicant considers this email from the Opposer's current counsel inexcusable and capable of invoking great harm, if a party was unaware that such was a misrepresentation of the truth. I also consider this email and act by the Opposer's counsel and others as a violation of 37 C.F.R. §11.401, 37 C.F.R. §11.403, ABA Model Rules of Professional Conduct, Rules 4.1, 4.3 and 8.4. It was apparent from the start that the Opposer's new counsels main objectives were to intimidate and prevent the Applicant and her predecessor from litigating this matter.

The Opposer's current counsel has repeatedly made condescending and derogatory remarks to and about the Applicant within correspondence and court documents. They requested on pages 5 through 7 of their reply filed in support of their motion for summary judgment, that the Board "ignore" and "sift through" my arguments and urged "the Board to take any and all comments made by BWC "with a grain of salt" as the company is speaking solely through its non-attorney owner Ms. Wiseberg rather than through counsel". It is inappropriate for the Opposer's counsel to request the Board "ignore" and "sift through" my arguments and take them "with a grain of salt". A party's arguments should be judged on their merits and not by who



delivers them. The legal system exists to protect parties legal rights, not to employ attorneys and give them a playground to intimidate, brow-beat and subdue their adversaries. It appears that often attorneys are used by parties to strip others of their rights. Many times a party will win a case based solely on their financial resources and their ability to obtain counsel and not on the rightness of their claim, and in such a case, cause harm to the legal justice system.

The Opposer and their counsel have requested of the Board “additional remedies given the outrageous course of this proceeding” on page 9 of their motion to dismiss/strike. They have stated in their motion that “Xikar could move the Board to sanction BWC for its frivolous conduct pursuant to Fed. R. Civ. P. 11 but prefers to avoid tying up further resources of the Board and the parties” and then proceeds to without question request inappropriate sanctions against the Applicant. How exactly are the Opposer and their counsel not “tying up further resources of the Board and the parties”. They’re essentially requesting sanctions, which forces the Applicant to respond to their inappropriate and vague accusations, and requires the Board to make a decision on the matter. Whose time has been saved except perhaps the Opposer’s counsel. TBMP § 527.02 states “a motion for sanctions must be made separately from any other motion”, the Opposer’s counsel has apparently tried to avoid this requirement and the criteria of a motion for sanctions. The Opposer and their counsel have made vague and meritless accusations and have stated that the Applicant’s conduct has been frivolous and that if not for the Applicant and her predecessors lack of counsel, the case would likely never have been filed and would have been settled. It is absurd for the Opposer to state that “this proceeding would likely never have been filed” and “would be settled” if the Applicant had counsel, but it appears to be common practice of the Opposer and their counsel, to make statements that misrepresent the truth in their favor. The Opposer filed this litigation at the bewilderment of the Applicant and her

predecessor, and has now made a vague and false statement blaming the Applicant for the filing of this matter and lack of settlement between the parties.

The Opposer and their counsel have misrepresented the truth by stating on page 2 of their motion to dismiss/strike that the Applicant has “refused to make a counteroffer”. I have previously made a counteroffer on September 9, 2013 to the Opposer’s first offer of settlement dated August 5, 2013, of which the Opposer’s current counsel, is well aware (as evidenced in Applicant’s Exhibit “B”) and did not even respond with a yes or no, much less a revised/counteroffer. The Opposer has only made two settlement offers; the first proposed settlement offer dated August 5, 2013, and the second settlement offer dated August 7, 2014. During the discovery conference the Opposer’s former counsel stated their client would like to settle this matter and later sent their first outlined proposed settlement offer on August 5, 2013. I declined the settlement offer and I later sent a counteroffer to the Opposer on September 9, 2013. The Opposer and their counsel never responded to such counteroffer, and on August 7, 2014 the Opposer made their second settlement offer. I rejected the second offer and essentially stated I found such proposal inauthentic (considering their first settlement offer) and requested the Opposer forward a reasonable and fair settlement offer, if they had such an offer, to which Ginnie C. Derusseau responded by sending me an antagonizing, condescending and misleading email and requested that I send them a counteroffer. Before I could even respond to their last email regarding a counteroffer, the Opposer’s counsel attached the settlement negotiations to their motion to dismiss/strike as an exhibit, and proceeded to use such as a basis for their request that the Board force the Applicant to obtain counsel, participate in mediation in Kansas City, Missouri, Xikar, Inc.’s place of business or other such forced action.

I don’t believe the Opposer has any right to dictate and control the use of my mark



“Cicar” nor I’m I required to accept either of the Opposer’s two settlement offers that contain provisions that I relinquish certain rights, especially when I don’t believe the Opposer has any right to request this. I would never agree to the Opposer’s proposed amendment in their latest settlement offer. Furthermore, why would I agree to the Opposer dismissing their case without prejudice, which would enable them to re-file their case at a later date and at the same time agree to relinquish my right to further challenge their use, registrations or applications for the mark “Xikar”. I find it extremely inappropriate that the Opposer’s counsel berated the Applicant as to how beneficial their settlement proposal was to me (which it is not) and then proceeded to improperly attached such settlement correspondence to their motion as a justification to request the Board force an action on the Applicant. It appears the Opposer and their counsel may have made their latest settlement offer as only a ruse and a prop for their motion to dismiss/strike.

The Opposer and their counsel are trying to use the fact that the Board struck the Applicant’s counterclaims in their decision dated July 18, 2014 as a platform to attack the Applicant. The Opposer’s counsel has made a vague inference on page 9 of their motion to dismiss/strike, that because I’m not represented by counsel this has caused “protracted discovery issues”. This is a false and misleading statement, if a party has elongated discovery, it is the Opposer and their counsel. Since the Opposer and their counsel did not elaborate on what they meant by the Applicant’s lack of counsel having caused “protracted discovery issues”, it is impossible for the Applicant to give a proper defense to such a statement. I will respond to this vague accusation by stating, the Opposer and their counsel have repeatedly not answered or incorrectly answered many of the Applicant’s discovery requests. This is not the forum for such an argument, but in response to the Opposer’s inference and as an example of the Opposer and their counsels inadequate responses to the Applicant’s discovery requests; I will reference some of the Opposer and their counsels’ responses to the Applicant’s Request for Admissions.

The Applicant requested that the Opposer admit or deny whether or not documents produced by the Opposer were true and correct copies of such documents. The Opposer and their counsel responded to Requests No.'s 6 through 44 (Applicant's Exhibit "D"), by stating "Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence", without offering an admittance or denial, and then proceeded to attach the same and similar documents as evidence to their motion for summary judgment. There is many more of the Applicant's discovery requests that have either not been answered or answered incorrectly because the Opposer and their counsel will oftentimes object to and not answer a discovery request, or they will answer a request how it pleases them, so as to always give a response in a light most favorable to the Opposer, with no concern for actually answering the request or the necessity of being completely truthful.

The Opposer's counsel stated on page 1 of their reply filed in support of their motion for summary judgment that I had "done an admirable job navigating the complexities of trademark law up to this point", then proceeded to criticize the Applicant as is normal for the Opposer's counsel. I would not lend credence to any of the Opposer or their counsels statements or assertions, but I just wanted to note that such statement (though condescending) is contrary to their current assertions that this proceeding has taken an outrageous course and that the Applicant has displayed frivolous conduct. I have had to wade through insults to get to the substance, if any, of the Opposer and their counsels' arguments. The only party guilty of a smear campaign (page 8 of Opposer's Motion to Dismiss/Strike) has been the Opposer and their counsel, by the filing of their opposition proceeding, and who have repeatedly tried to taint the Board against the Applicant with their slew of derogatory and misleading comments.

Any attorney no matter their experience in trademark law may represent a party before the Board in trademark matters. Attorneys are taught legal concepts in law school and not



specifically how to litigate a matter and like myself would need to read and familiarize themselves with the laws that govern trademark proceedings and its procedures. I'm not an attorney, but I'm not without prior experience in and understanding of legal issues. I've previously worked in the legal field for many years, though not in the area of trademark law, as a paralegal/legal assistant and I hold a degree.

I respectfully request the Board deny the Opposer's request that the Board require the Applicant to either obtain counsel, participate in mediation held in Kansas City, Missouri, Xikar, Inc.'s place of business or other such forced action. The Applicant should not be forced to either obtain counsel or relinquish my rights in this matter nor should the Applicant be forced into mediation with the Opposer. Mediation will not change my position on this matter nor would it convince me to agree to the Opposer and their counsels' settlement terms and their ever changing position on this matter. It would truly be a waste of time and resources and a forced hardship on the Applicant. The Opposer and their counsel have made vague, false and misleading statements to justify their request; which is contrary to the governing law. As I have proven through evidence (see Applicant's Exhibit B) the Opposer's counsel has been trying to force the Applicant to obtain counsel or relinquish the right to litigate this matter since their first written communication and I believe this has been done solely to prevent the Applicant and her predecessor from defending their rights in this matter. The greatest leverage a company has against a new and smaller company, are their financial resources. These resources enable them to intimidate and subdue an opponent into relinquishing their rights solely because they're unable to defend themselves against an attack.

#### V. CONCLUSION AND REQUEST

The Applicant's counterclaim for cancellation of the Opposer's mark "Xikar", US

Registration No. 2200215, has been filed in response to and in defense of the opposition proceeding filed by the Opposer against the Applicant's mark. If the Opposer were not trying to obtain rights they were not entitled to by and through their trademark "Xikar", by filing an opposition proceeding to enforce such unentitled rights, at the detriment of both the Applicant and her predecessor, the Applicant's counterclaim would never have been filed. The Opposer has damaged the Applicant and her predecessor by filing their opposition to the mark "Cicar", and the Applicant has simply looked to the validity of the Opposer's trademark in defense of my intellectual property.

The Applicant has amended her counterclaim pursuant to Fed. R. Civ. P. 15 and the Board's decision dated July 18, 2014, granting the Applicant until August 14, 2014 to file and amend her counterclaim against the Opposer, and contains new allegations and grounds learned during this proceeding and through discovery, as stated on page 1 of the Applicant's Amended Counterclaim. If the Board's intention was only to allow the Applicant to file amended versions of the stricken claims previously filed, then I respectfully request the Board allow the Applicant pursuant to Fed. R. Civ. P. 15; TBMP § 303.04; 37 CFR § 2.106(b)(2)(i); and 37 CFR §2.115 to amend her counterclaim to include the new allegations and grounds pleaded.

Though I believe the Applicant's Amended Counterclaim has been properly pleaded, if the Board finds for any reason that the Applicant's Amended Counterclaim and individual claim(s) within are defective in any way, then pursuant to TBMP § 503.03, I would respectfully request the Board allow the Applicant to further amend her counterclaim to correct any such deficiencies within.

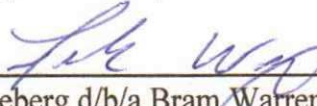
The Applicant respectfully requests the Board deny the Opposer's Motion to Dismiss and Motion to Strike. In addition, I respectfully request the Board deny the Opposer and their counsels inappropriate request that the Board require the Applicant to either obtain counsel, participate in mediation held in Kansas City, Missouri, Xikar, Inc.'s place of business, or other



forced action.


Dated: September 24, 2014

Respectfully submitted,

By:   
Debra Wiseberg d/b/a Bram Warren Company  
18100 S.W. 50 Street  
Southwest Ranches, FL 33331  
Telephone No.: (954) 297-0329  
Email: bramwarren@bramwarren.com

CERTIFICATE OF FILING

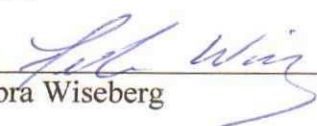
I hereby certify that the Applicant's Response to the Opposer's Motion to Dismiss or, in the alternative, Motion to Strike Applicant's Amended Counterclaims, Opposition Brief and Exhibits were filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board by ESTTA on September 24, 2014.

By:   
Debra Wiseberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Applicant's Response to the Opposer's Motion to Dismiss or, in the alternative, Motion to Strike Applicant's Amended Counterclaims, Opposition Brief and Exhibits were sent to the counsel for the Opposer by the United States Postal Service, first class mail on September 24, 2014 to the following address:

Ginnie C. Derusseau  
Erickson, Kernell, Derusseau & Kleypas LLC  
8900 State Line Road, Suite 500  
Leawood, KS 66206

By:   
Debra Wiseberg

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application Serial No. 85/652,496,  
filed June 14, 2012, CICAR

XIKAR, INC.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91209617
	)	
DEBRA WISEBERG D/B/A BRAM	)	
WARREN COMPANY,	)	
	)	
Applicant.	)	
_____	)	

**OPPOSER'S RESPONSES TO APPLICANT AND  
COUNTERCLAIM PLAINTIFF'S REQUEST FOR ADMISSIONS**

Pursuant to Fed. R. Civ. P. 36 and 37 C.F.R. § 2.120, Opposer. Xikar, Inc.,  
hereby responds to Applicant's Requests for Admissions.

**INSTRUCTIONS**

1. In answering these requests for admissions, admit the matter of which an admission is requested; deny the matter; or state in detail the reasons why you cannot truthfully admit or deny the matter.
2. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify an answer or deny only part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.
3. Do not give lack of information or knowledge as a reason for failure to admit or deny a request for admission unless you so state that you have made reasonable



## REQUESTS FOR ADMISSIONS

### REQUEST NO. 1:

During the conversation that occurred between "Bram Warren" and Kurt Van Keppel before Xikar, Inc. filed their Notice of Opposition, Mr. Van Keppel stated to "Bram Warren" that Xikar, Inc. did not mind if the mark "Cicar" was used in commerce by the Applicant but that they wanted the Applicant to withdraw the Trademark Application.

Do you admit that Mr. Van Keppel made this statement?

### Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, this is admitted to the extent that Mr. Van Keppel was making an offer of settlement of the dispute in order to avoid the time and expense of this proceeding.

### REQUEST NO. 2:

During the conversation that occurred between "Bram Warren" and Kurt Van Keppel before Xikar, Inc. filed their Notice of Opposition, Mr. Van Keppel stated to "Bram Warren" that he obtained his telephone number by contacting a former distributor of "Bram Warren" ashtrays.

Do you admit that Mr. Van Keppel made this statement?

### Response:

Opposer objects on the ground that this request seeks irrelevant information and

information not reasonably calculated to lead to the discovery of admissible evidence.

---



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Exhibit "B"

Submitted by Debra Wiseberg

Applicant in Opposition No. 91209617

Xikar, Inc. v. Debra Wiseberg

**Subject: Opposition No. 91209617****From: Ginnie Derousseau <[ginnied@kcpatentlaw.com](mailto:ginnied@kcpatentlaw.com)>****Date: Thu, Sep 19, 2013 12:49 pm****To: "bramwarren@bramwarren.com" <[bramwarren@bramwarren.com](mailto:bramwarren@bramwarren.com)>**

Ms. Wiseberg:

Pursuant to your telephone message, I am replying via e-mail. I would have preferred to have spoken in person.

It does not appear that you are an attorney. It is a longstanding rule that corporations must be represented by counsel in legal proceedings. If you are not an attorney, we will be happy to discuss this proceeding and substantively respond to your September 9, 2013 letter with your counsel.

If you are an attorney, please confirm this with me.

Regards,

Ginnie C. Derousseau

Erickson, Kernell, Derousseau &amp; Kleypas LLC

913-549-4700

913-549-4646 (fax)

[ginnied@kcpatentlaw.com](mailto:ginnied@kcpatentlaw.com) <<mailto:ginnied@kcpatentlaw.com>>

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Exhibit "C" (2 Pages)  
Submitted by Debra Wiseberg  
Applicant in Opposition No. 91209617  
Xikar, Inc. v. Debra Wiseberg

**Subject: RE: Opposition No. 91209617**

**From: bramwarren@bramwarren.com**

**Date: Fri, Sep 20, 2013 10:32 am**

**To: "Ginnie Derusseau" <ginnied@kcpatentlaw.com>**

Ms. Derusseau,

My response to the statements you have made in your email regarding the requirement for our corporation to retain legal counsel to represent us in this matter and that you will only communicate with such is as follows:

**37 C.F.R. §11.14 Individuals who may practice before the Office in trademark and other non-patent matters.**

**37 C.F.R. §11.14(e)(3) any individual may appear in a trademark matter for a corporation of which she is an officer and which she is authorized to represent, if such corporation is a party to a trademark proceeding pending before the Office.**

I am not an attorney. I am an officer of Bram Warren Company, a Florida corporation, of which authority to appear on behalf of the corporation in this trademark matter has been bestowed upon by said corporation pursuant to the aforementioned and TBMP §114 and TBMP § 114.01.

Debra Wiseberg, Vice President  
Bram Warren Company, a Florida corporation  
18100 S.W. 50 Street  
Southwest Ranches, FL 33331  
Telephone: (954) 297-0329  
Email: [bramwarren@bramwarren.com](mailto:bramwarren@bramwarren.com)

----- Original Message -----

Subject: Opposition No. 91209617

From: Ginnie Derusseau <[ginnied@kcpatentlaw.com](mailto:ginnied@kcpatentlaw.com)>

Date: Thu, September 19, 2013 12:49 pm

To: "[bramwarren@bramwarren.com](mailto:bramwarren@bramwarren.com)" <[bramwarren@bramwarren.com](mailto:bramwarren@bramwarren.com)>

Ms. Wiseberg:

Pursuant to your telephone message, I am replying via e-mail. I would have preferred to have spoken in person.

It does not appear that you are an attorney. It is a longstanding rule that corporations must be represented by counsel in legal proceedings. If you are not an attorney, we will be happy to discuss this proceeding and substantively respond to your September 9, 2013 letter with your counsel.

If you are an attorney, please confirm this with me.

Regards,



Ginnie C. Derusseau  
Erickson, Kernell, Derusseau & Kleypas LLC  
913-549-4700  
913-549-4646 (fax)  
[ginnied@kcpatentlaw.com](mailto:ginnied@kcpatentlaw.com) <<mailto:ginnied@kcpatentlaw.com>>

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application Serial No. 85/652,496,  
filed June 14, 2012, CICAR

XIKAR, INC.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91209617
	)	
DEBRA WISEBERG D/B/A BRAM	)	
WARREN COMPANY,	)	
	)	
Applicant.	)	
_____	)	

**OPPOSER'S RESPONSES TO APPLICANT AND  
COUNTERCLAIM PLAINTIFF'S REQUEST FOR ADMISSIONS**

Pursuant to Fed. R. Civ. P. 36 and 37 C.F.R. § 2.120, Opposer. Xikar, Inc.,  
hereby responds to Applicant's Requests for Admissions.

**INSTRUCTIONS**

1. In answering these requests for admissions, admit the matter of which an admission is requested; deny the matter; or state in detail the reasons why you cannot truthfully admit or deny the matter.
2. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify an answer or deny only part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.
3. Do not give lack of information or knowledge as a reason for failure to admit or deny a request for admission unless you so state that you have made reasonable



REQUEST NO. 6:

Do you admit that the document as labeled by the Opposer as XIKAR-000124 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 3" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 7:

Do you admit that the document as labeled by the Opposer as XIKAR-000149 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 4" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 8:

Do you admit that the document as labeled by the Opposer as XIKAR-000151 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 5" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 9:

Do you admit that the document as labeled by the Opposer as XIKAR-000152 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 6" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 10:

Do you admit that the document as labeled by the Opposer as XIKAR-000170 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to



this document as "Document 7" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 11:

Do you admit that the document as labeled by the Opposer as XIKAR-000182 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 8" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 12:

Do you admit that the document as labeled by the Opposer as XIKAR-000200 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 9" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 13:

Do you admit that the document as labeled by the Opposer as XIKAR-000201 given to the

Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 10" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 14:

Do you admit that the document as labeled by the Opposer as XIKAR-000205 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 11" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 15:

Do you admit that the document as labeled by the Opposer as XIKAR-000206 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 12" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 16:



Do you admit that the document as labeled by the Opposer as XIKAR-000207 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 13" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 17:

Do you admit that the document as labeled by the Opposer as XIKAR-000209 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 14" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 18:

Do you admit that the document as labeled by the Opposer as XIKAR-000219 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 15" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 19:

Do you admit that the document as labeled by the Opposer as XIKAR-000235 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 16" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 20:

Do you admit that the document as labeled by the Opposer as XIKAR-000236 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 17" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 21:

Do you admit that the document as labeled by the Opposer as XIKAR-000250 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 18" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.



REQUEST NO. 22:

Do you admit that the document as labeled by the Opposer as XIKAR-000285 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 19" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 23:

Do you admit that the document as labeled by the Opposer as XIKAR-000295 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 20" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 24:

Do you admit that the document as labeled by the Opposer as XIKAR-000317 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 21" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and

information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 25:

Do you admit that the document as labeled by the Opposer as XIKAR-000395 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 22" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 26:

Do you admit that the document as labeled by the Opposer as XIKAR-000399 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 23" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 27:

Do you admit that the document as labeled by the Opposer as XIKAR-000408 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 24" is a genuine true and correct copy of such document.

Response:



Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 28:

Do you admit that the document as labeled by the Opposer as XIKAR-000431 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 25" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 29:

Do you admit that the document as labeled by the Opposer as XIKAR-000432 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 26" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, admit.

REQUEST NO. 30:

Do you admit that the document as labeled by the Opposer as XIKAR-000437 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached

to this document as "Document 27" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 31:

Do you admit that the document as labeled by the Opposer as XIKAR-000438 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 28" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 32:

Do you admit that the document as labeled by the Opposer as XIKAR-000444 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 29" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 33:

Do you admit that the document as labeled by the Opposer as XIKAR-000445 given to the



Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 30" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 34:

Do you admit that the document as labeled by the Opposer as XIKAR-000446 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 31" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 35:

Do you admit that the document as labeled by the Opposer as XIKAR-000447 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 32" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 36:

Do you admit that the document as labeled by the Opposer as XIKAR-000449 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 33" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 37:

Do you admit that the document as labeled by the Opposer as XIKAR-000462 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 34" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 38:

Do you admit that the document as labeled by the Opposer as XIKAR-000466 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 35" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.



REQUEST NO. 39:

Do you admit that the document as labeled by the Opposer as XIKAR-000467 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 36 is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 40:

Do you admit that the document as labeled by the Opposer as XIKAR-000468 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 37" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 41:

Do you admit that the document as labeled by the Opposer as XIKAR-000469 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 38" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 42:

Do you admit that the document as labeled by the Opposer as XIKAR-000470 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 39" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 43:

Do you admit that the document as labeled by the Opposer as XIKAR-000471 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 40" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 44:

Do you admit that the document as labeled by the Opposer as XIKAR-000472 given to the Applicant by the Opposer in response to the Applicant's First Set of Interrogatories, attached to this document as "Document 41" is a genuine true and correct copy of such document.

Response:

Opposer objects on the ground that this request seeks irrelevant information and

information not reasonably calculated to lead to the discovery of admissible evidence.

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